No. 78946-1

MADSEN, J. (concurring)—While I agree with the majority's holding that the school's drug testing program does not withstand constitutional scrutiny, I disagree that article I, section 7 of the Washington Constitution categorically prohibits our adoption of the "special needs" exception. The majority's analysis sweeps far too broadly, casting doubt on the validity of even suspicion-based school searches. As noted by Justice J.M. Johnson in his concurring opinion, even before the United States Supreme Court issued *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), this court sanctioned school searches on less than probable cause in view of the unique responsibilities of school officials and the diminished privacy interests of students. Concurrence (J.M. Johnson, J.) at 16. I believe that a narrowly drawn special needs exception also is consistent with Washington law. However, I concur in the result reached by the majority because on this record there is no special need that justifies suspicionless

drug testing of Wahkiakum School District's student athletes. In particular, the school district has failed to show that a suspicion-based regime of drug testing is inadequate to achieve its legitimate objectives.

Article I, section 7 prohibits the government from intruding on a citizen's "private affairs" without "authority of law." Wash. Const. art. I, § 7. As this court has held, "authority of law" may be supplied by an exception to the warrant requirement that is rooted in "'well-established principles of the common law.'" *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (quoting *City of Seattle v. McCready*, 123 Wn.2d 260, 273, 868 P.2d 134 (1994)). One such well-established common law principle is that a warrantless search may be permissible when the purpose of the search is other than the detection or investigation of a crime. For example, a warrantless inventory search of an automobile is permissible under article I, section 7 for the purposes of preventing property loss and protecting the police from liability. *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980). Similarly, under the community caretaking exception, a warrantless search may be permissible when necessary for the purpose of rendering aid or performing routine health and safety checks. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004); *State v. Acrey*, 148 Wn.2d 738, 754, 749, 64 P.3d 594 (2003) (police justified in detaining 12-year-old shortly after midnight in an isolated area and transporting him home at mother's request) (citing and quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d

706 (1973) (enunciating "community caretaking function[]" exception to warrant requirement); *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000) (same), *cert. denied*, 531 U.S. 1104 (2001)).

Another well-established common law principle is that a warrantless search may be permissible when adherence to the warrant requirement would be impracticable under the circumstances. Thus, we have recognized that warrantless searches may be permissible under article I, section 7 when certain exigent circumstances require immediate action to avoid the destruction of evidence or the flight of a suspect. *State v. Cardenas*, 146 Wn.2d 400, 405-07, 47 P.3d 127, 57 P.3d 1156 (2002) (warrantless entry to motel room in hot pursuit of armed robbery suspects); *State v. Johnson*, 128 Wn.2d 431, 454, 909 P.2d 293 (1996) (exigency created by ready mobility of vehicles supports warrantless automobile search); *State v. Stroud*, 106 Wn.2d 144, 147, 151, 720 P.2d 436 (1986) (same); *State v. Baldwin*, 109 Wn. App. 516, 523, 37 P.3d 1220 (2001) (exigent circumstances may justify warrantless blood drug test of DUI (driving under influence) suspect).

Contrary to the majority's view, the "special needs" exception is rooted in these well-established common law principles. *See In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 100, 847 P.2d 455 (1993) (recognizing the "'special needs'" exception is among the "'few specifically established and well-delineated exceptions'" to the warrant requirement (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *California v.*

Acevedo, 500 U.S. 565, 580, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991))). We recently addressed the special needs exception in *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007). In that case, we held that suspicionless DNA (deoxyribonucleic acid) testing of convicted felons is permissible under the Fourth Amendment to the United States Constitution, applying either the special needs exception or the exception for minimally intrusive searches. *Id*. at 81. Because we concluded such testing does not intrude on a convicted felon's "private affairs," we had no need to address whether the special needs exception would have provided the necessary "authority of law" under article I, section 7. However, nothing in the plurality and concurring opinions suggests the special needs exception to the warrant requirement is inconsistent with article I, section 7, although the plurality suggests the scope of the exception must be narrowly drawn. *See also State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993) (recognizing special needs exception to warrant requirement allows suspicionless DNA testing of convicted felons under the Fourth Amendment, while declining to decide the issue under article I, section 7 for inadequate briefing).

The special needs exception encompasses a "closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 520 U.S. 305, 309, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). There are two threshold requirements to establish a "special need." First, the need must be "special" in the sense that it serves a purpose other than the ordinary need for effective law

enforcement. *Skinner*, 489 U.S. at 619; *see, e.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (special need to detect drug use by armed customs officials to deter malfeasance where test results may not be used in a criminal prosecution absent employee's consent); *cf. Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (no special need for nonconsensual drug testing of pregnant hospital patients where results are conveyed to law enforcement); *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (no special need for suspicionless highway checkpoint stops where primary purpose was crime control). Second, and more importantly, the traditional requirement of a warrant and probable cause must be inadequate to fulfill the purpose of the search. *Von Raab*, 489 U.S. at 665-66; *see, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 556-61, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (inability to detect contraband in passing vehicles justifies suspicionless border stop); *cf. Chandler*, 520 U.S. at 321 (no special need for drug-testing political candidates who are subject to intensive public scrutiny). In determining whether a special need justifies a warrantless search, courts evaluate the nature of the privacy interest involved, the character of the governmental intrusion, the need and immediacy of the government's concerns, and the efficacy of the means chosen to meet those concerns.

Remarkably, the term "special needs" first appeared in a Supreme Court

opinion adopting the view of *this court* (among others) that "the special needs of the school environment" justify warrantless searches by school authorities who have a reasonable suspicion the search will unearth a student's illicit activity. *T.L.O.*, 469 U.S. at 332 n.2 (citing *State v. McKinnon*, 88 Wn.2d 75, 558 P.2d 781 (1977)). In *McKinnon*, *id*. at 80, we recognized school officials must be free "to maintain order and discipline" in the school environment in order to carry out their duties of both educating and protecting the children in their care. We observed that maintaining discipline and order often requires immediate action, which is incompatible with a warrant requirement. Accordingly, this court adopted a flexible approach to evaluating the propriety of a school search, involving a fact-intensive inquiry that takes into account the child's age, history, and school record; the seriousness of the illicit activity; the need for immediacy; and the reliability of the information provided. And, in *Kuehn v. Renton School District No. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985), although we disallowed suspicionless searches of the personal luggage of student band members, we held that such searches would be permissible based on a reasonable belief of wrongdoing.

Thus, we have recognized the school setting requires some modification of the level of suspicion of illicit activity needed to justify a search based upon the "special needs" in this environment. Of course, a suspicionless search is qualitatively different from a search based on individualized suspicion. Nevertheless, I agree with Justice J.M. Johnson that suspicionless drug testing may

be permissible if the requirements necessary to meet the special needs exception are met.

However, I disagree with the test he proposes for evaluating whether a special need justifies a suspicionless search. According to Justice J.M. Johnson, "a constitutional program of random suspicionless drug testing of student athletes should advance compelling interests, show narrow tailoring, and employ a less intrusive method of testing." Concurrence (J.M. Johnsion, J.) at 20. Although a special needs analysis is similar to such strict scrutiny, it differs in important ways. In particular, an indispensable component of the special needs analysis is the impracticality of adherence to the traditional requirements. Regardless of the strength of the government's need for a search, or the closeness of the fit of the means chosen to achieve the state's legitimate goals, a search cannot be justified under the special needs exception absent a showing that adherence to the requirement of a warrant and probable cause would be impracticable under the circumstances. *See, e.g., Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991) (nonconsensual HIV (human immunodeficiency virus) test of man who bit police officer unjustifiable as a "special need" because there was no immediate need to test without a warrant).

A balancing test that omits this requirement threatens to turn "special needs" into an exception that swallows the general rule prohibiting warrantless searches. "[B]alancing tests without carefully prescribed limits can be inherently

dangerous because 'when an individual's suspected harmful conduct is balanced against societal interests, individual privacy losses will appear negligible in relation to government's efforts to protect society.'" *Olivas*, 122 Wn.2d at 105 n.88 (Utter, J., concurring) (quoting Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 Santa Clara L. Rev. 89, 95 (1992)). Thus, in *Juveniles*, Justice Utter warned that recognizing a special need for a suspicionless search without first finding an individualized suspicion standard unworkable in the particular context would create a potentially unlimited exception. *Juveniles*, 121 Wn.2d at 102 (Utter, J., concurring in part, dissenting in part). Similarly, in *Olivas*, Justice Utter took issue with the majority's application of the special needs test in the context of DNA testing of convicted felons, reasoning a search must be truly divorced from ordinary law enforcement purposes to fall within the exception. *Olivas*, 122 Wn.2d at 107-08 (Utter, J., concurring).

In *Surge*, 160 Wn.2d at 81, we indicated our agreement with Justice Utter ("Certainly the concurring opinion in *Olivas* is more consistent with our cases interpreting article I, section 7." (citing *Olivas*, 122 Wn.2d at 107-08)). Consistently with our decisions relating to other warrant exceptions, we suggested the scope of the special needs exception is more narrowly drawn under article I, section 7 than under the Fourth Amendment. *See, e.g.*, *Thompson*, 151 Wn.2d 793 (limiting scope of community caretaking function); *Kinzy*, 141 Wn.2d at 395 (police exceeded scope of community caretaking function by detaining minor

longer than necessary to assure her safety); *State v. Ferrier*, 136 Wn.2d 103, 114, 960 P.2d 927 (1998) (scope of consent search); *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998) (limiting automobile inventory searches to unlocked compartments); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984) (limiting scope of community caretaking function); *Stroud*, 106 Wn.2d 144 (scope of exigent circumstances as applied to automobile searches); *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984) (scope of search incident to arrest).

The reasonableness clause of the Fourth Amendment permits a balancing approach as an alternative to a warrant under a broader range of circumstances than does article I, section 7. *State v. Chenoweth*, 160 Wn.2d 454, 463-64, 158 P.3d 595 (2007). Thus, in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), a majority of the United States Supreme Court reasoned that a random, suspicionless drug test would be better than a suspicion-based test as a policy matter, not that an individualized suspicion requirement was unworkable in the school context. Instead of examining the impracticality of a suspicion-based search, the Court asked only whether the government's interest was important enough to justify the privacy invasion at issue. And in *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002), the Supreme Court expanded the special needs exception even further. Rather than requiring that a school demonstrate an actual problem with student drug abuse, the Court

essentially took judicial notice of the issue, observing that the "war against drugs" is a "pressing concern" in every school. *Id*. at 834. Moreover, the court justified suspicionless drug testing for the purpose not of protecting others, but of protecting the drug-abusing student from his or her own illicit conduct. *Id*. at 836.

In contrast to the Fourth Amendment, article I, section 7 protects privacy interests without express limitation and exceptions to the warrant requirement must be narrowly applied. *Chenoweth*, 160 Wn.2d at 463-64. In particular, a warrant exception applies only when the reason for the search "fall[s] within the scope of the reason for the exception." *Ladson*, 138 Wn.2d at 357 (article I, section 7 prohibits pretextual traffic stops); *see also Houser*, 95 Wn.2d at 154 (inventory searches must be conducted in "good faith," not as a pretext for criminal investigation). Thus, article I, section 7 does not necessarily require us to follow the lead of the United States Supreme Court in expanding the scope of the special needs exceptions to encompass a broad range of applications where the State has failed to establish the traditional requirement of individualized suspicion is impracticable.

As Justice O'Connor stated in her forceful dissent in *Acton*:

> [A] suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual.

Acton, 515 U.S. at 678 (O'Connor, J., dissenting).

A requirement of individualized suspicion may be unworkable because the purpose of the search is so unrelated to criminal activity as to render the concepts of probable cause and reasonable suspicion inapt. *See, e.g., Acrey*, 148 Wn.2d at 748-49 (individualized suspicion not required when police officers are engaged in noncriminal, noninvestigative "community caretaking functions"); *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 119-20, 821 P.2d 44 (1991) (allowing suspicionless polygraph testing to evaluate honesty and integrity of Washington State Patrol applicants). Alternately, individualized suspicion may be unworkable because the object of the search is hidden or latent, or otherwise presents inadequate opportunities for detection. *Von Raab*, 489 U.S. at 674 (lack of opportunities to observe armed field agents responsible for interdicting drugs); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (airport searches); *Downing v. Kunzig*, 454 F.2d 1230, 1233 (6th Cir. 1972) (allowing suspicionless searches upon entrance to federal courthouse; requiring individualized suspicion "would as a practical matter seriously impair the power of government to protect itself against ruthless forces bent upon its destruction").

In deciding whether individualized suspicion is unworkable, courts consider both the opportunities for developing the requisite individualized suspicion and the severity of the consequences that may ensue by failing to detect illicit conduct. Thus, in *Skinner*, 489 U.S. 602, the Supreme Court upheld suspicionless drug

testing for train operators involved in a train wreck, taking into account the chaos following a serious rail accident, the ephemeral nature of the evidence to be obtained, and the magnitude of the danger to public safety posed by drug or alcohol impaired railway workers. Likewise, in *Von Raab*, 489 U.S. at 668, the Court concluded suspicion-based drug testing of customs officials would be unworkable considering such employees often work unsupervised, carry firearms, and are the "first line of defense" against breaches of our national borders. *See also Martinez-Fuerte*, 428 U.S. at 557 (suspicion-based traffic stops in border areas unworkable because flow of traffic impedes observation).

Some courts have found the special needs exception applicable in the context of locker searches or metal detectors for the purpose of protecting students from violence in the schools. For example, the Wisconsin Supreme Court permitted random locker searches for the purpose of deterring students from bringing weapons to school in response to a series of gun-related incidents that created "'an atmosphere of tension and fear.'" *In re Interest of Isiah B.*, 176 Wis. 2d 639, 642, 500 N.W.2d 637, *cert. denied*, 510 U.S. 884 (1993). Similarly, the California Court of Appeals approved suspicionless searches using metal detectors for the purpose of keeping weapons off campus. *In re Latasha W.*, 60 Cal. App. 4th 1524, 70 Cal. Rptr. 2d 886 (1998). In finding a requirement of individualized suspicion unworkable, the California court reasoned that schools have "no feasible way to learn that individual students have concealed guns or knives on their

persons, save for those students who brandish or display the weapons. And, by the time weapons are displayed, it may well be too late to prevent their use." *Id.* at 1527; *see also People v. Dukes*, 151 Misc. 2d 295, 580 N.Y.S. 2d 850 (Crim. Ct. 1992) (approving suspicionless searches of high school students using a metal detector for purposes of deterring students from bringing weapons to school).

In this case the school has failed to show a suspicion-based testing regime is not a feasible means of maintaining student order, discipline, and safety. Students, unlike train operators, customs officials, or highway motorists, are under almost constant surveillance by teachers, coaches, peers, and others. Drug and alcohol use often involves observable manifestations that would supply the particularized suspicion necessary to support a search. *Cf. Von Raab*, 489 U.S. at 674 (finding a suspicion-based search unworkable where field officers are not subject to daily supervision); *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (suspicion-based searches of airline passengers unworkable where profile-method of detection is unreliable).

Moreover, the record is devoid of evidence that drug use actually interferes with the school's ability to maintain order, discipline, and student safety. *Cf. Acton*, 515 U.S. at 649 (discipline problems caused by rampant drug use; student athletes the "leaders of the drug culture"; open use of drugs); *Skinner*, 489 U.S. at 606-07 (high percentage of railway workers are problem drinkers). The school's statistical evidence of drug use by students does not adequately establish a special

need for suspicionless testing. *See City of Seattle v. Mesiani*, 110 Wn.2d 454, 458 n.1, 755 P.2d 775 (1988) (finding statistical probability that sobriety checkpoints will intercept drug-impaired motorists inadequate to justify suspicionless investigative stops).

If drug use does not result in observable manifestations that adversely impact the school's ability to provide a safe, orderly environment, the school's interest in detecting drug use does not justify nonconsensual drug testing.[1] On the other hand, if drug use is an actual problem, school officials likely will have the individualized suspicion necessary to require a drug test, particularly given the relaxed standard of suspicion applicable in the school context. *See McKinnon*, 88 Wn.2d at 81. Thus, it is difficult to see how a suspicionless drug testing program is necessary.

In addition, the record shows that the selection of student athletes was not because athletes as a class are responsible for drug-related harm, as in *Acton* (athletes were leaders of the drug culture, responsible for discipline problems), but because they had reduced expectations of privacy vis-a-vis the other students,

[1] The school argues that some performance enhancing drugs may be undetectable yet offers no evidence of an actual problem with drug-related sports injuries. The school also argues that detecting the use of performance enhancing drugs is necessary to protect the integrity of athletic events. However, the harm threatened by the unfair use of performance-enhancing drugs is simply not great enough to justify nonconsensual suspicionless drug testing. *Cf. Skinner*, 489 U.S. at 628 ("disastrous consequences" of a train wreck); *Rushton v. Neb. Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (danger posed by drug-impaired nuclear power plant operators); *Edwards*, 498 F.2d 496 (a single hijacked airline can destroy hundreds of lives and millions of dollars of property).

making it more likely the district's drug-testing program would pass constitutional muster. Nothing in the record suggests athletes account for a disproportionate number of drug users or that drug-related sports injury is a particular problem. Article I, section 7 does not permit the pretextual use of a warrant exception. *Ladson*, 138 Wn.2d 343*; cf. Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *Stroud*, 106 Wn.2d 144; *cf. New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

Even if the district could demonstrate that a suspicion-based testing regime is unworkable, the balance of interests at stake weighs against allowing suspicionless drug testing, taking into account the student's privacy interest, the nature of the intrusion, and its limited efficacy as compared with a search regime based on individualized suspicion.

First, as to the interest involved, student athletes undoubtedly have a strong privacy interest in their excretory functions. A state-compelled urine test is "particularly destructive of privacy and offensive to personal dignity." *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting). In *Acton*, the Court found urine testing a minimal intrusion in view of the diminished expectations of privacy held by student athletes, who undress and shower in communal locker rooms. Although students generally have a diminished expectation of privacy in the school setting, the privacy interests of student athletes are not substantially lower than those of students in general. Most students, not just athletes, must share communal locker

rooms (physical education classes) and restroom facilities. However, it is difficult to understand how the necessity to share locker rooms and restrooms diminishes a student's expectation that their excretory functions will not be subject to governmental intrusion absent particularized suspicion of wrongdoing.

Next, considering the nature of the intrusion, the *Earls* court reasoned that compelled urine testing is minimally intrusive, stating "the invasion of students' privacy is not significant." *Earls*, 536 U.S. at 834. This dubious premise is inconsistent with Washington law. Certainly monitored urine collection and urine testing is more intrusive than the pat-down search or brief interrogative stop that we have found highly intrusive in the past. *See Mesiani*, 110 Wn.2d at 458 (finding brief interrogative stop of highway travelers "highly intrusive"); *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 673, 658 P.2d 653 (1983) (characterizing a pat-down search of concert-goers as a "high degree of intrusion"); *cf. Surge*, 160 Wn.2d at 78-79 (compelled DNA blood testing of convicted felons is not highly intrusive in view of diminished privacy interests and limitations on use).

A suspicionless testing regime must also be likely to actually accomplish its goals. One of the district's goals is to protect student athletes who may be harmed by those who engage in athletic competitions while impaired by drugs. But testing a student athlete weeks or months before an athletic event does little to prevent that from happening. A urine test remote in time from the event does not detect present drug use that might affect performance. In contrast, the school could

intercept those most likely to pose a threat to others by applying a suspicion-based drug-testing policy at the time of the athletic competition.

Another goal of the drug-testing program is general deterrence of drug use by students. Yet by focusing on student athletes, the school has targeted a group less likely to use drugs than students generally. Moreover, a student who wishes to continue using drugs merely needs to forego participation in athletic activities. As pointed out by the Washington Education Association and Drug Policy Alliance in their amicus brief, drug testing may actually be counterproductive, as participation in athletic activities is itself an important factor in discouraging drug use and the drug testing program may actually discourage such participation, isolating students from healthy activities. The district has failed to show that suspicionless drug testing would be significantly more effective in achieving its stated goals than a suspicion-based regime. The limited effectiveness of the drug testing policy does not justify the indignity visited upon students who must submit to it. Indeed, suspicionless drug testing jeopardizes other important educational objectives, including preparing students to become responsible citizens who share a common understanding and appreciation of our constitutional values.

On this record the district has failed to demonstrate that its suspicionless drug testing program justifies application of the special needs doctrine.

Conclusion

The majority errs in categorically rejecting the special needs exception to the warrant requirement. Under limited circumstances, a suspicionless search may be permissible when the requirement of individualized suspicion would jeopardize an important governmental interest beyond the ordinary interest in law enforcement. The special needs exception is consistent with well-established common law principles governing warrantless searches and, thus, comports with article I, section 7. However, while I believe there may be circumstances that justify suspicionless drug testing of students, I agree that this case does not present them. Thus, I concur in the result.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Bobbe J. Bridge, Justice Pro Tem.